

DEPARTMENT OF STATE REVENUE

04980211P.LOF

LETTER OF FINDINGS NUMBER: 98-0211P

Penalty Assessment

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUE

Imposition of Penalty

Authority: IC 6-8.1-10-2.1(d); Rule 45 IAC 15-11-2

Taxpayer protests the imposition of penalty.

STATEMENT OF FACTS

Taxpayer was assessed a 10% negligence penalty for late filing of the ST 103 sales/use tax returns for the months of July, August, October and December 1996; January, February, March, May, June, August and September 1997. Taxpayer was also assessed a 10% negligence penalty for failing to file sales/use tax returns by EFT for the months of January, February, March, April, May, June and July 1997. Also, the taxpayer was assessed a 10% negligence penalty for the late filing of the withholding tax return for August 1996.

Taxpayer hired a new controller on August 5, 1996 giving the new controller full control over the remittance of the sales/use tax and withholding taxes. According to an affidavit of probable cause filed with the county superior court and a miscellaneous incident report filed with the police department, the controller has been charged with several counts of theft/embezzlement beginning on or about September 4, 1996 through January 29, 1997. The controller's employment was terminated on or about February 24, 1997 when he failed to show up for work. Taxpayer cites to the alleged theft/embezzlement as the reason for the late filing sales/use tax and withholding tax returns.

A review of the taxpayer's payment history indicates that prior to July 1996, taxpayer's sales/use tax payments by EFT were timely. Apparently, the taxpayer did not discover the unfiled sales/use tax returns until May 30, 1997. The penalties assessed for the periods July, August, October and December 1996 have all been paid. The penalty assessed for the period August 1997 has been canceled.

DISCUSSION

Indiana Code 6-8.1-10-2.1(d) provides:

(d) If a person subject to penalty imposed under this section can show that the failure to file a return, pay the full amount of tax shown on the person's return, timely remit the tax held in trust, or pay the deficiency determined by the department was due to reasonable cause and not due to willful neglect, the department shall waive the penalty.

In the case at hand the taxpayer relied on the controller to timely file and remit the sales/use and withholding taxes due. As has been shown by the evidence presented taxpayer's faith and confidence in the controller hired in August 1996 was misplaced. However, this does not establish reasonable cause. Although not legal precedent, the U.S. 9th Circuit Court of Appeals unpublished decision in San Diego Drywall, Inc. v. U.S. of America [95-1 USTC 50,313] (1995) citing Conklin Bros. of Santa Rosa, Inc. v. U.S. of America [93-1 USTC 50,116], 986 F2d 315 (1993) is persuasive as no evidence has been presented to indicate that the corporation was disabled or incapacitated by the alleged acts of the controller.

A corporation that failed to file and pay several quarterly tax payments because its comptroller was embezzling those funds was liable for late filing penalties. The corporation's other officers were not immediately aware of the embezzlement. When they learned of it, the comptroller was fired and the required filings and payments were made promptly. Nevertheless, the corporation did not have reasonable cause not to file the returns or pay the taxes. In order to meet the reasonable cause standard, the corporation must have shown that it was under a disability. Because the other corporate officers were capable of filing the returns and paying the taxes, there was no disability.

FINDING

The department will address each period below:

Liability #96-0043513 – July 1996 – Sales/Use – The return was filed two (2) days late. Since this was taxpayer's first late return from an otherwise good record of timely filing the department will waive the penalty. Department will refund the penalty imposed of \$2,293. The department will not refund the other costs incurred by the taxpayer of \$315.33.

Liability #96-0054530 – August 1996 – Sales/Use -- The return was filed four (4) days late. Reasonable

cause has not been established. The liability has been satisfied with the payment \$2,928.04.

Liability #96-0105386 – August 1996 – Withholding – The return was filed nineteen (19) days late. Reasonable cause has not been established. The liability has been satisfied with the payment of \$593.13.

Liability #96-0105387 – July 1996 – Withholding -- The return was filed nineteen (19) days late. Since this was the taxpayer's first late withholding tax return in an otherwise good record of timely filing withholding tax returns, the department will refund the penalty of \$472. The other costs incurred by the taxpayer of \$55.65 will not be waived.

Liability # 96-0121028 – October 1996 – Sales/Use – The return was filed five (5) days late. Reasonable cause has not been established. The liability has been satisfied with the payment of \$3,419.16.

Liability #96-0171260 – December 1996 – Sales/Use – The return was filed seventeen (17) days late. Reasonable cause has not been established. The liability has been satisfied with a payment of \$659.42.

Liability #96-0173631 – December 1996 – Withholding – The return was filed ten (10) days late. Reasonable cause has not been established. The liability has been satisfied with a payment of \$393.12.

Liability #96-0193442 – December 1996 – Sales/Use – Penalty was imposed because the sales tax due per the quarterly recap exceeded the total of the sales/use tax paid for the months of October, November and December. This adjustment was not attributable to willful neglect. The adjustment was attributable to a mistake in reporting the sales tax due. Department will refund the penalty imposed \$427.

Liability #97-0030367 – January 1997 – Sales/Use – The return was filed June 6, 1997 (137 days late). Reasonable cause has not been established. No evidence has been presented which would indicate the corporate officers were not capable of filing and remitting the taxes due timely. This 10% penalty was imposed for failure to file by EFT. The department will waive this penalty, but will impose the negligence penalty assessed under liability # 97-0061385 for filing the sales/use tax return late. The department will not stack the negligence penalty.

Liability #97-0030368 – February 1997 – Sales/Use – The return was filed June 6, 1997 (78 days late). Reasonable cause has not been established. No evidence has been presented which would indicate the corporate officers were not capable of filing and remitting the taxes due timely. This 10% penalty was imposed for failure to file by EFT. The department will waive this penalty, but will impose the negligence penalty imposed for a late-filed return (liability #97-0061386). The department will not stack the negligence penalty.

Liability #97-0046042 – July 1997 – Sales/Use – This return was filed July 30, 1997; however, the taxpayer failed to remit the sales/use tax due by EFT. The penalty is waived. IC 6-8.1-10-2.1(a)(5) imposes a penalty if a person:

(5) is required to make a payment by electronic funds transfer (. . .), overnight courier, or personal delivery and the payment is not received by the department by the due date in funds acceptable to the department; In this case the return and funds (a check) was received by the department by the due date, thus no penalty is applicable.

Liability #97-0046043 – June 1997 – Sales/Use – This return was filed August 15, 1997 (26 days late). Reasonable cause has not been established. No evidence has been presented which would indicate that the corporate officers were incapable of filing and remitting the taxes due timely. This 10% penalty was imposed for failure to file by EFT. The department will waive this penalty, but will impose the negligence penalty for filing a late return. See liability #97-0061390. The department will not stack the negligence penalty.

Liability #97-0046044 – May 1997 – Sales/Use – This return was filed August 15, 1997 (56 days late). Reasonable cause has not been established. No evidence has been presented which would indicate the corporate officers were incapable of filing the returns by the due date. This 10% penalty was imposed for failure to file by EFT. The department will waive this penalty, but will impose the negligence penalty assessed in liability #97-0061389 for filing a late sales/use tax return. The department will not stack the negligence penalty.

Liability #97-0046045 – March 1997 – Sales/Use – This return was filed May 30, 1997 (41 days late). Reasonable cause has not been established. No evidence has been presented which would indicate the corporate officers were incapable of filing the returns by the due date. This 10% penalty was imposed for failure to file by EFT. The department will waive this penalty, but will impose the negligence penalty assessed in liability #97-0061387 for filing a late sales/use tax return. The department will not stack the negligence penalty.

Liability #97-0046046 – April 1997 – Sales/Use – This return was filed August 8, 1997 (80 days late). Reasonable cause has not been established. No evidence has been presented which would indicate the corporate officers were incapable of filing the returns by the due date. This 10% penalty was imposed for failure to file by EFT. The department will waive this penalty, but will impose the negligence penalty for filing a late return. See liability #97-0061388. The department will not stack the negligence penalty.

Liability #97-0056258 – August 1997 – Sales/Use – This liability will be canceled as the EFT section

agreed to waive the penalty for this period. The penalty assessed in liability #97-0061391 was previously canceled.

Liability #97-0070899 – September 1997 – Sales/Use – This return was filed October 27, 1997 (7 days late). Reasonable cause has not been established.

CONCLUSION

The penalty imposed for July 1996 (sales/use tax) has been waived and will be credited to other liabilities. The penalty incurred for August 1996 (sales/use tax and withholding tax) has been paid and the protest has been denied. The penalty imposed for July 1996 (withholding tax) has been waived and will be credited to other liabilities. Penalties imposed for October 1996 (sales/use tax), December 1996 (sales/use tax) and December 1996 (withholding tax) has been paid and the protest has been denied. The penalty protest for quarter ending December 1996 has been sustained. The penalty paid of \$427 will be credited to other liabilities.

The EFT penalty imposed for the periods January and February has been waived. However, the negligence penalty imposed for late filing of the respective sales/use tax returns for these months will stand and the taxpayer's protest is denied. The taxpayer's protest of the EFT penalty for July 1997 has been sustained. The taxpayer protest of the EFT penalty imposed for the periods June 1997, May 1997, March 1997 and April 1997 has been sustained. However, the negligence imposed for late filing of the respective sales/use tax returns for these months will stand the taxpayer's protest is denied.

The penalty imposed for August 1997 (sales/use tax) has been waived. The protest of the penalty imposed for September 1997 (sales/use tax) has been denied.